APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2323

BALMORIS ALEXANDER CONTRERAS-MARTINEZ,
PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

Submitted August 21, 2009
Decided October 13, 2009

Before WILKINSON, KING, and GREGORY, Circuit Judges.

Petition denied by unpublished per curiam opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Balmoris Alexander Contreras-Martinez, a native and citizen of El Salvador, petitions for review of an order of the Board of Immigration Appeals ("Board") dismissing his appeal from the immigration judge's order denying his applications for asylum, withholding of removal and withholding under the Convention Against Torture ("CAT"). We deny the petition for review.

The INA authorizes the Attorney General to confer asylum on any refugee. 8 U.S.C. § 1158(a) (2006). It defines a refugee as a person unwilling or unable to return to his native country "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A) (2006). "Persecution involves the infliction or threat of death, torture, or injury to one's person or freedom, on account of one of the enumerated grounds. . . ." *Li v. Gonzales*, 405 F.3d 171, 177 (4th Cir. 2005) (quotation marks and citations omitted).

An alien "bear[s] the burden of proving eligibility for asylum," *Naizgi v. Gonzales*, 455 F.3d 484, 486 (4th Cir. 2006) ; *see* 8 C.F.R. § 1208.13(a) (2009), and can establish refugee status based on past persecution in his native country on account of a protected ground. 8 C.F.R. § 1208.13(b)(1). Without regard to past persecution, an alien can establish a well-founded fear of persecution on a protected ground. *Ngarurih v. Ashcroft*, 371 F.3d 182, 187 (4th Cir. 2004).

The well-founded fear standard contains both a subjective and an objective component. The objective component requires a showing of specific, concrete facts that would lead a reasonable person in like circumstances to

fear persecution. *Gandziami-Mickhou v. Gonzales*, 445 F.3d 351, 353 (4th Cir. 2006). "The subjective component can be met through the presentation of candid, credible, and sincere testimony demonstrating a genuine fear of persecution . . . . [It] must have some basis in the reality of the circumstances and be validated with specific, concrete facts . . . and it cannot be mere irrational apprehension." *Li*, 405 F.3d at 176 (quotation marks, citations, and alteration omitted).

A determination regarding eligibility for asylum or withholding of removal is affirmed if supported by substantial evidence on the record considered as a whole. *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). Administrative findings of fact, including findings on credibility, are conclusive unless any reasonable adjudicator would be compelled to decide to the contrary. 8 U.S.C. § 1252(b)(4)(B) (2006). Legal issues are reviewed de novo, "affording appropriate deference to the [Board's] interpretation of the INA and any attendant regulations." *Lin v. Mukasey*, 517 F.3d 685, 691-92 (4th Cir. 2008). This court will reverse the Board only if "the evidence . . . presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution." *Elias-Zacarias*, 502 U.S. at 483-84; *see Rusu v. INS*, 296 F.3d 316, 325 n.14 (4th Cir. 2002).

We find no error in the Board's denial of Contreras-Martinez' claims for asylum and withholding of removal. His proposed social group of adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities is too broad and ill-defined to qualify as a "particular social group" within the meaning of the INA. *See* 8 U.S.C. §§ 1101(a)(42)(A), 1231(b)(3).

The Board has defined "persecution on account of membership in a particular social group" within the meaning of the INA to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic[,] . . . one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences." *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987). Further, as detailed in *In re C-A-*, 23 I. & N. Dec. 951, 960 (B.I.A. 2006) and affirmed in *In re A-M-E- & J-G-U-*, 24 I. & N. Dec. 69, 74-76 (B.I.A. 2007), in addition to "immutability," the Board requires that a particular social group have: "(1) social visibility, meaning that members possess characteristics . . . visible and recognizable by others in the native country, . . . (2) be defined with sufficient particularity to avoid indeterminacy, . . . and (3) not be defined exclusively by the fact that its members have been targeted for persecution[.]" *Scatambuli v. Holder*, 558 F.3d 53, 59 (1st Cir. 2009) (quotation marks, citations, and alterations omitted).

Contreras-Martinez' claims fail this test because he has not demonstrated that members of his proposed group are perceived by gang members or others in El Salvador as a discrete group. *See Ucelo-Gomez v. Mukasey*, 509 F.3d 70, 73 (2d Cir. 2007) ("[M]embership in a purported social group requires a certain level of 'social visibility.'"); *Matter of S-E-G-*, 24 I. & N. Dec. 579, 586-88 (B.I.A. 2008) (concluding that Salvadoran youths who resist gang recruitment are not a cognizable social group because they do not share recognizable and discrete attributes). Additionally, the proposed group is inchoate, as it is comprised of a potentially large and diffuse seg-

ment of El Salvadoran society. *See Matter of S-E-G-*, 24 I. & N. Dec. at 585. To the extent that Contreras-Martinez suggests that the Board's definition of "particular social group" should not control here, we defer to its reasonable interpretation of that term. *See Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190, 1197-98 (11th Cir. 2006); *see also Scatambuli*, 558 F.3d at 59-60 (upholding "social visibility" as a criteria for a particular social group).

We further find that substantial evidence supports the Board's finding that Contreras-Martinez was not eligible for relief under the CAT. Accordingly, we deny the petition for review. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

PETITION DENIED.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
DECISION OF THE BOARD OF IMMIGRATION APPEALS
FALLS CHURCH, VIRGINIA

A98-115-469 – Baltimore, MD

IN RE BALMORIS ALEXANDER CONTRERAS-MARTINEZ

IN REMOVAL PROCEEDINGS
APPEAL

Oct. 29, 2008

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER

PER CURIAM. The respondent appeals from the decision of the Immigration Judge to deny his applications for asylum, withholding of removal, and protection under the Convention Against Torture. The appeal is dismissed.

On appeal, the respondent argues that the MS-13 gangs in El Salvador persecuted him on account of his membership in a particular social group, namely "adolescents in El Salvador who refuse to join gangs of that country because of their opposition to the gangs' violent criminal activities." The respondent argues that members of this group share a common immutable characteristic that is fundamental to their identities. The respondent argues that he demonstrated that the government of El Salvador has acquiesced to gang violence against its citizens and contends that he is therefore eligible for protection under the Convention Against Torture.

We have defined a "social group" to be "a group of persons all of whom share a common, immutable characteristic." *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (holding that a Salvadoran taxi cooperative did not constitute a particular social group). The respondent's proposed social group of "adolescents in El Salvador who refuse to join gangs of that country because of their opposition to the gangs' violent criminal activities" is too broad and ill defined to constitute a discrete particular social group within the meaning of the Immigration and Nationality Act. *See Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008) (Neither Salvadoran youth who have been subjected to recruitment efforts by the MS-13 gang and have rejected and who rejected or resisted membership in the gang based on their own personal, moral, and religious opposition to the gang's values and activities nor the family of member of such Salvadoran youth constitute a "particular social group"). Therefore, we adopt and affirm the decision of the Immigration Judge finding that the respondent's proposed social group does not constitute a particular social group within the meaning of the Act. *Id.; INS v. Elias-Zacarias*, 502 U.S. 478 (1992); *Lopez-Soto v. Ashcroft*, 383 F.3d 228 (4th Cir. 2004);

Matter of E-A-G-, 24 I&N Dec. 591 (BIA 2008) (finding that "persons resistant to gang membership" does not constitute a particular social group).

We do not find sufficient evidence to establish that the government of El Salvador has acquiesced to gang violence against its citizens at present or in the future. We note that the United States Court of Appeals for the Eighth Circuit squarely addressed this question and found that while the government of El Salvador may have a problem controlling gang activity of which it is aware, this is not sufficient to find acquiescence to torture by third parties. *See Menjivar v. Gonzales*, 416 F.3d 918, 923 (8th Cir. 2005). 8 C.F.R. § 1208.18(a)(1). The United States Court of Appeals for the Fourth Circuit affirmed this Board's conclusion that a Guatemalan alien failed to establish eligibility for relief under the Convention Against Torture because he had not shown that the government of Guatemala acquiesced in the torturous activities of the Mara 18 criminal gang. *Lopez-Soto v. Ashcroft*, *supra*, at 240. Accordingly, the respondent's appeal is dismissed.

Frederick D. Hess
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
BALTIMORE, MARYLAND

A98-115-469

IN THE MATTER OF CONTRERAS-MARTINEZ,
BALMORIS ALEXANDER, RESPONDENT

IN REMOVAL PROCEEDINGS

CHARGE: **Immigration and Nationality Act ("INA") § 212(a)(6)(A)(i),** as amended, in that Respondent is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General

APPLICATIONS: Asylum, pursuant to **INA § 208;** Withholding of Removal pursuant to **INA § 241(b)(3);** and Withholding of Removal pursuant to **Article 3 of the United Nations Convention Against Torture and Other Forms**

of Cruel, Inhuman or Degrading Treatment or Punishment (CAT)

MEMORANDUM OF DECISION AND ORDER

I. Procedural History

Respondent is a 20-year-old male, native and citizen of El Salvador. He arrived in the United States at or near Brownsville, Texas on or about July 15, 2004 and was intercepted by immigration officials. Respondent was placed in proceedings through the issuance of a Notice to Appear ("NTA"), dated July 15, 2004. The NTA alleges that: (1) Respondent is not a citizen or national of the United States; (2) Respondent is a native of El Salvador and a citizen of El Salvador; (3) Respondent arrived in the United States at or near Brownsville, Texas, on or about July 15, 2004; and (4) Respondent was not then admitted or paroled after inspection by an Immigration Officer. Based upon these allegations, the NTA charges Respondent with removability pursuant to **INA § 212(a)(6)(A)(i)**.

At a master calendar hearing held on March 7, 2005, Respondent admitted the factual allegations contained in the NTA and conceded the charge of removability. Thus, the Court sustained the charge of removability under **INA § 212(a)(6)(A)(i)**. At the request of DHS counsel, El Salvador was designated by the Court as the country of removal. On May 2, 2005, Respondent filed his application for asylum under **INA § 208**, withholding of removal under **INA § 241(b)(3)**, and withholding of removal under the **Convention Against Torture**. A merits hearing was held on October 28, 2005, wherein Respondent testified on his own behalf and offered the witness

testimony Dr. Negro. Following the merits hearing, the Court reserved its decision to review the testimony and evidence presented, and to allow the Government to complete its background check. The background check is complete, and the Court has now had an opportunity to consider, in full, the contents of Respondent's application as well as the contents of all documents that were admitted into evidence. For the following reasons, all applications for relief will be denied.

II. Evidence Presented

A. Testimonial Evidence

Testimony of Respondent[1]

Respondent testified that he reluctantly agreed to attend the initiation of his friend Mauricio into a gang because he always liked to accompany Mauricio and did not realize what would happen. Although Respondent had heard about Mara Salvatrucha (or MS-13) at the time, he was not clear about what the group signified. Initially, Respondent told Mauricio that he did not want to attend the initiation because of his Christian and moral beliefs — i.e. that he was opposed to the killing, robbing, and raping that the gang was known for. This did not stop Respondent's attendance because he looked up to Mauricio as an older brother — Respondent loved, admired, and appreciated him. Even though Respondent was fearful of MS-13 at the time, his fear escalated after Mauricio

[1] Respondent stipulated to the detailed facts contained in his affidavit. Therefore, testimony began with cross-examination, and Respondent was given the opportunity for re-direct examination if necessary.

joined. Respondent was not concerned that members of MS-13 would contact him because the initiation was for Mauricio and because Respondent did not stay for the entire initiation. No one attempted to stop Respondent from leaving the initiation. He indicated that the MS-13 gang allowed him to leave because they were aware of his values at the time and only attempted to force him to join the gang after Mauricio did.

Respondent stated that he attempted to avoid gang members, but they continued to beat him and call him derogatory names. Other children in Respondent's age group also had problems with the gang. He said that if he were forced to return, he would no longer be a student but because the gangs are everywhere, it would impossible to avoid their recruitment efforts. Further, Respondent testified that members of the gang knew him, and therefore, it would be impossible to relocate within El Salvador.

Lastly, Respondent testified that his family — with the exception of his alcoholic father — is in the U.S. His two brothers, three sisters, and his mother live here.

There was no re-direct examination.

Testimony of Dr. Paulo J. Negro[2]

Dr. Negro testified that, during the course of his sessions with Respondent, there did not appear to be any malingering. He said that it would have been difficult for Respondent to reproduce a consistent emotional response if he were not truthful. In fact, Respondent's re-

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[2] Respondent stipulated to the facts contained in the witness's report. Therefore, testimony began with cross-examination, and Respondent was given the opportunity for re-direct examination if necessary.

sponse was somewhat restricted or limited. Dr. Negro indicated that Respondent used to have intrusive memories but now exhibits more avoidance characteristics.

Dr. Negro initially saw Respondent in September for an hour-long interview and again in October to see how Respondent was doing and to make sure there had been no changes before the hearing. Dr. Negro stated that because of Respondent's restricted emotion, he also had a second session to see if he could "get something else from him." Dr. Negro testified that the normal interview length required to make a diagnosis of post traumatic stress disorder can be less than an hour and that it depends on the type of symptoms exhibited.

B. Documentary Evidence:

The following exhibits were received and admitted into evidence:

Exhibit 1:

- Notice to Appear, dated July 15, 2004

Exhibit 2:

- Form I-589, Application for Asylum and for Withholding of Removal, and supporting documentation:
  - A. Affidavit of Respondent
  - B. English translation of Respondent's affidavit
  - C. Report and resume of Luis Rodriguez
  - D. Affidavit of Alex Sanchez
  - E. U.S. Department of State 2004 Country Report on the Human Rights Practices in El Salvador

F. Birth Certificate of Respondent
G. English translation of Respondent's birth certificate
H. Report of Dr. Mauricio Arturo Erazo Anaya
I. English translation of Dr. Anaya's report
J. Report and curriculum vitae of Dr. Paulo J. Negro
K. Affidavit of Jose Contreras
L. Certificate of Attendance, Miguel de Unamuno Institute
M. English translation of Certificate of Attendance
N. Copy of one page of Respondent's Salvadoran passport
O. English translation of passport
P. U.S. Department of Justice December 10, 1998 Memorandum entitled *Guidelines for Children's Asylum Claims*
Q. U.S. Department of State March 17, 2005 Consular Information Sheet on El Salvador
R. September 17, 2004 Washington Post article entitled *Central America's Gang Crisis*
S. September 26, 2004 New York Times article entitled *Latino gangs Confound the Law*
T. July 20, 2005 El Diario de Hoy article entitled *Asesinan a un estudiante a balazos en San Martin*
U. English translation of Subexhibit T

V. August 2, 2005 Diario El Mundo article entitled *Se dispara ola de homicidios en El Salvador, un promedio de 12 diarios*

W. English translation of Subexhibit V

X. June 7, 2005 New York Times article entitled *How the Street Gangs Took Central America*

Y. *Country of Origin Research*, Canada Immigration & Refugee Board (November 28, 2002)

Z. November 8, 2004 Ameriquests article entitled *Youth, Gangs, and Corruption in Honduras: Social Group Membership and Political Opinion as Grounds for Political Asylum in the United States*

AA. Decision of the Immigration Judge, **In re D-V-**, Immigration Court, San Antonio, TX (September 9, 2004)

BB. Decision of the Immigration Judge, **Matter of Lopez-Soto**, Immigration Court, Arlington, VA (April 19, 2001)

III. Statement of Law and Findings of the Court

The Court has considered the entire record carefully. All evidence and testimony has been considered, even if not specifically addressed further below. Respondents' applications for asylum under **INA § 208**, withholding of removal under **INA § 241(b)(3)**, and withholding of removal under the **Convention Against Torture** are denied based on the following findings.

A. Applicable Standards

INA § 208(a) provides that an alien may be granted asylum in the exercise of discretion if he or she qualifies as a refugee within the meaning of INA § 101(a)(42)(A). An applicant for asylum "bears the burden of establishing that he or she meets the 'refugee' definition of INA § 101(a)(42)(A)," which defines a refugee in part as an alien who is unable or unwilling to return to his or her home country because of persecution, or a well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion. Matter of S-P-, 21 I&N Dec. 486 (BIA 1996); see also 8 C.F.R. § 1208.13(a); INA § 208(a). The alien requesting asylum bears the evidentiary burden of proof and persuasion in connection with any application under INA § 208. See 8 C.F.R. § 1208.13(a); see also Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); Matter of Acosta, 19 I&N Dec. 211, 215 (BIA 1985), modified on other grounds, Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1987). The alien's fear of persecution must be country-wide. Acosta, 19 I&N Dec. at 235; see also Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988). Additionally, the alien must establish that he or she is unable or unwilling to avail himself or herself of the protection of the alien's country of nationality or last habitual residence. INA § 101(a)(42)(A). Finally, the alien must demonstrate that he or she is eligible for asylum as a matter of discretion. See INA § 208(b)(1); see also INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

In applications for asylum, withholding of removal, and withholding of removal under Article 3 of the Convention Against Torture, the Court generally makes a threshold determination of the alien's credibility. See Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998); see also

Matter of Pula, 19 I&N Dec. 467 (BIA 1987); Matter of Vigil, 19 I&N Dec. 572 (BIA 1988). An applicant's own testimony is sufficient to meet his or her burden of proving the asylum claim if it is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis of his or her fear. See Matter of Dass, 20 I&N Dec. 120, 124 (BIA 1989); see also 8 C.F.R. § 1208.13(a). An applicant may be given the "benefit of the doubt" if there is some ambiguity regarding an aspect of the asylum claim where credibility is not specifically called into question. See Matter of Y-B-, 21 I&N Dec. 1136 (BIA 1998). In assessing the application for asylum, inconsistent accounts create doubts regarding the alien's credibility. See Matter of Mogharrabi, 19 I&N Dec. 439, 446 (BIA 1957). To be sure, in some cases, an applicant may be found to be credible even if he or she has trouble remembering specific facts. See e.g., Matter of B-, 21 I&N Dec. 66 (BIA 1995) (finding that an alien who has fled persecution may have trouble remembering exact dates when testifying, and such failure to provide precise dates may not be an indication of deception). However, testimony is not considered credible when it is inconsistent, contradictory with current country conditions, or inherently improbable or implausible. See Matter of S-M-J-, 21 I&N Dec. 722 (BIA 1997); see also Matter of A-S-, 21 I&N Dec. 1106 (BIA 1998) (holding that a credibility finding should be accorded a high degree of deference when the discrepancies described by the Immigration Judge are actually present, the discrepancies provide specific reasons to conclude that the alien provided incredible testimony and "a convincing explanation for the discrepancies and omissions has not been supplied by the alien" although he had the opportunity to do so). Furthermore, the presentation by an asylum applicant of an identification document that is

found to be false not only discredits the applicant's claim as to the critical elements of identity and nationality, but, in the absence of a sufficient explanation, also indicates an overall lack of credibility regarding the entire claims. See Matter of O-D-, 21 I&N Dec. 1079 (BIA 1998).

An applicant must also prove that there is a reasonable possibility that he or she might suffer persecution if returned to his or her native country. See 8 C.F.R. § 1208.13(b)(2)(i)(B). A well-founded fear of persecution must be both subjectively genuine and objectively reasonable. See Cardoza-Fonseca, 480 U.S. at 421. A respondent must show some degree of likelihood that he or she may be persecuted. Matter of Acosta, 19 I&N at 226; see also Cardoza-Fonseca, 480 U.S. at 431. The BIA has interpreted "persecution" to include serious threats to an individual's life or freedom, or the infliction of significant harm on the applicant, as a means of punishing that person for holding a characteristic that the persecutor seeks to overcome. Matter of Acosta, 19 I&N at 233. Cf. Klawitter v. INS, 970 F.2d 149, 152 (6th Cir. 1992) (distinguishing between mere harassment and persecution); Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) (finding that persecution within the INA does not encompass all treatment that society regards as unfair, unjust, or even unlawful or unconstitutional); Matter of Kasinga, 21 I&N Dec. 357, 365 (BIA 1996) (discussing the level of harm necessary to constitute persecution). Persecution must also be more than mere harassment. See Mikhailevitch v. INS, 146 F.3d 384, 390 (6th Cir. 1998). The persecution must also be on account of one of the protected grounds specified in the "refugee" definition. In mixed motive cases, any asylum application is not obliged to show conclusively why persecution has occurred or may occur; however, in proving past persecu-

tion, the applicant must produce evidence, either direct or circumstantial, from which it is reasonable to believe that the harm was motivated in part by an actual or imputed political ground. See In re S-P-, 21 I&N Dec. 486 (BIA 1996); see also I.N.S. v. Elias-Zacarias, 112 S.Ct. 812 (1992)(finding that persecution on *account of* political opinion is not established by the fact that the coercing guerrillas had "political" motives; in order to satisfy § 101(a)(42), the persecution must be on account of the *victim's* political opinion, not the persecutor's).

An applicant for asylum demonstrates a well-founded fear if he or she presents specific facts establishing that he or she has actually been the victim of persecution. Cardoza-Fonseca, 480 U.S. at 421; Matter of Mogharrabi, 19 I&N Dec. at 439. Evidence of past persecution raises a rebuttable presumption that an alien has reason to fear future persecution. Matter of Chen, 20 I&N Dec. 16 (BIA 1989); 8 C.F.R. § 1208.13(b)(1)(i). This presumption may be rebutted by proving by a preponderance of the evidence that conditions in the country have changed to such a degree that there is little likelihood of present persecution. Matter of Chen, 20 I&N Dec. at 18; see also Ngarurih v. Ashcroft, 371 F.3d 182 (4th Cir. 2004).

An applicant for asylum and withholding must demonstrate that his fear of being targeted by gangs would constitute persecution "on account of" a recognized ground. Lopez-Soto v. Ashcroft, 383 F.3d 228 (4th Cir. 2004).

Withholding of removal, in contrast to asylum, confers only the right not to be deported to a particular country rather than the right to remain in the U.S. See INS v. Aguirre-Aguirre, 526 U.S. 415 (1999). To establish eligibility for withholding of removal, a respondent

must show that there is a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group, or political opinion. See INS v. Stevic, 467 U.S. 407 (1984). Such a showing requires that the respondents establish that it is more likely than not that they would be subject to persecution if returned to the country from which they seek withholding of removal. See INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987). Thus, the standard for withholding of removal is more stringent than the standard for asylum. Stevic at 429-430.

The applicant for withholding of removal under the **Convention Against Torture** bears the burden of proving that it is "more likely than not" that he or she would be tortured if removed to the proposed country of removal. See 8 C.F.R. § 1208.16(c)(2). "Torture" is defined in the treaty and at 8 C.F.R. § 1208.18(a)(1). Additionally, the torture must come at the hands of the government of El Salvador. See Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000). In assessing whether the applicant has satisfied his or her burden of proof, the Court must consider all evidence relevant to the possibility of future torture, including: evidence of past torture inflicted upon the applicant; evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; evidence of gross, flagrant, or mass violations of human rights within the country of removal; and other relevant information of conditions in the country of removal. See 8 C.F.R. § 1208.16(c)(3). Because a claim under the **Convention Against Torture** is analytically distinct from an asylum claim, the Court may not deny an alien's **Convention Against Torture** claim solely on the basis of an adverse credibility determination.

Camara v. Ashcroft, 378 F.3d 361, 372 (4th Cir. 2004). However, the alien must present other evidence in support of his or her claim. Id.

The inability of a government to control criminal gangs does not constitute the "acquiescence" contemplated in Article III of the Convention Against Torture. Lopez-Soto v. Ashcroft, 383 F.3d 228 (4th Cir. 2004).

B. Analysis

In the matter *sub judice*, the Court finds that Respondent is credible. His overall testimony was candid, detailed, and for the most part, consistent. The harm that Respondent describes in his affidavit and in his sworn testimony is plausible given the historical information on country conditions which reflects that persecution and gang violence in El Salvador and other Latin American countries is rampant. After considering all relevant factors, along with the testimony and evidence of record, the Court resolves credibility in Respondent's favor. See INA § 208(b)(1)(B)(iii).

Credible testimony, however, can only satisfy an asylum applicant's burden of proof if it is persuasive and if it refers to sufficient facts to demonstrate that the applicant is a refugee. INA § 208(b)(1)(B)(ii). As the Court finds Respondent's testimony to be persuasive, the only question remaining is whether he has demonstrated that he is a refugee under the INA — *i.e.* that he is an alien who is unable or unwilling to return to his home country because of persecution, or a well-founded fear of persecution, on account of race, religion, nationality, membership in a particular social group, or political opinion as defined in the INA. See INA § 101(a)(42)(A).

Respondent's fear of persecution is based on his membership in a particular social group, which he defines as "adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities." See **Respondent's Memorandum of Law and Facts in Support of Application for Asylum, Withholding of Removal, and/or Withholding Under the Convention Against Torture**. Therefore, the question of whether he meets the definition of a refugee under the INA hinges on whether he has a well-founded fear of persecution on account of a protected ground.

Respondent described a continual pattern of harassing behavior beginning at an early age. And while these experiences were surely unpleasant, they do not, standing alone, rise to the level of persecution. However, the two incidents that Respondent described in detail, coupled with the continual harassment, do lead this Court to find that Respondent has been persecuted by the gangs in El Salvador. In September 2003, while walking home from school, Respondent was approached by several gang members and threatened with death. During a second incident, in the spring of 2004, Respondent was viciously beaten to the point of unconsciousness. Considering the serious nature of these events and the escalation in violence that was displayed toward Respondent, the Court readily concludes that Respondent has been the victim of persecution in the past.

However, merely establishing past persecution is not sufficient. Respondent must also demonstrate that this past persecution was inflicted *on account of* his claimed membership in a particular social group. 8 **U.S.C. § 1101(a)(42)(A)**. To make such a showing, he must (1) specify the particular social group, (2) show that he is a

member of that group, and (3) show that he has a well-founded fear of persecution based on his membership in that group. Lopez-Soto v. Ashcroft, 383 F.3d 228 (4th Cir. 2004). This Court recognizes that Respondent's membership need only be *a* motive for the persecution. See Matter of S-P-, 21 I&N Dec. 486 (BIA 1996). However, such motivation must be shown by a preponderance of the evidence. 8 C.F.R. § 208.13.

Membership in a particular social group must be defined by a characteristic that either is beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed. Persecution on account of membership in a particular social group has been interpreted to mean "persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is so fundamental to their individual identities or consciences. Only when this is the case does the mere fact of group membership become something comparable to the other four grounds of persecution under the Act, namely, something that either is beyond the power of an individual to change or that is so fundamental to [his] identity or conscience that it ought not be required to be changed. By construing 'persecution on account of membership in a particular social group' in this

manner, we preserve the concept that refuge is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution." **Matter of Acosta, 19 I&N Dec. 211 (B1A 1985).**

As noted above, Respondent defines his social group as "adolescents in El Salvador who refuse to join the gangs of that country because of their opposition to the gangs' violent and criminal activities." The Court, however, finds that this claimed social group is too tenuous to qualify as such under the INA. Accepting Respondent's designation would create a situation wherein virtually every non-criminal adolescent in El Salvador that was targeted by gang members would qualify for asylum in the United States. The Court declines to extend the definition of 'particular social group' to such extremes. Nonetheless, assuming *arguendo* that adolescents as Respondent describes them can constitute a particular social group under the INA, Respondent has failed to show that he was persecuted *on account of* his alleged membership in this group.

Respondent distinguishes his persecution from other accounts of forced recruitment by stating that he was persecuted because of his opposition to the gangs' violent and criminal activities, not simply because he refused to join. The Court, however, finds this to be a distinction without a difference. Further, there is no independent evidence of record to support Respondent's assertion that he was persecuted for something more than his simple refusal to join a gang.

Indeed, the persecutors did not mention Respondent's moral beliefs during either of the more serious attacks. Further, the report of Luis Rodriquez suggests that the gangs of Central America do persecute those

who refuse to join, but it does not say that the gangs do so for any reason other than the refusal itself. See **Group Exhibit 2, Subexhibit C.** The affidavit of Alex Sanchez indicates that "[a]lmost all young people in El Salvador are at risk of being targeted for recruitment by the gangs, but those who already have some ties with the gang are particularly expected to join. If an individual has been friends with members of a gang, they will think he is taking advantage of their protection and loyalty or feel disrespected if he does not eventually join the gang." See **Group Exhibit 2, Subexhibit D.** This is why Mauricio (and his gang) targeted Respondent — not because they were attempting to overcome Respondent's aversion to criminal activity.

Without more, this Court cannot find that there is any nexus between Respondent's persecution and his membership in the alleged social group. The situation at hand in Central America is distressing, and Respondent's case is, indeed, a sympathetic one. However, the Court is bound by the law. Because Respondent has failed to demonstrate a sufficient nexus, it cannot be said that the past persecution he faced was on account of a protected ground: For the same reason, the Court finds he is unable to establish that future persecution on account of a protected ground is likely. His applications for asylum pursuant to **INA § 208** and withholding of removal pursuant to **INA § 241(b)(3)** are, therefore, denied.

As a prerequisite to relief under the **Convention Against Torture**, an applicant must show that the torture feared would be inflicted by or with the acquiescence of a public official or other person acting in an official capacity; therefore, protection does not extend to persons that fear entities that a government is unable to control. **Lopez-Soto v. Ashcroft**, 383 F.3d 228 (4th Cir.

2004); Matter of S-V-, 22 I&N Dec. 1306 (BIA 2000). This standard requires an applicant to do more than show that officials are aware of the activity but are powerless to stop it: Id. Because Respondent fears torture at the hands of criminal gangs rather than a public official or other person acting in an official capacity, his claim under the **Convention Against Torture** fails. Accordingly, such relief is denied.

IV. Conclusion

The Court has found that Respondent has failed to meet his burden of proof with regard to his applications for asylum, withholding of removal under **INA § 241(6)(3)**, and withholding under the **Convention Against Torture**. Although Respondent's claim is credible, he has failed to show that persecution or torture would result if removed to El Salvador. Therefore, the applications for asylum under **INA § 208**, withholding of removal under **INA § 241(b)(3)**, and withholding of removal under the **Convention Against Torture** are denied. An appropriate order is attached.

ORDER

It is this 4th day of October 2006, by the United States Immigration Court, sitting at Baltimore, Maryland,

ORDERED:

I. that the application for asylum pursuant to **INA § 208** is **DENIED;**

II. that the application for withholding of removal pursuant to **INA § 241(b)(3)** is **DENIED;**

III. that the applications for withholding of removal, pursuant to **Article 3 of the Convention Against Torture** is **DENIED;** and

IV. that Respondent be **REMOVED** to El Salvador as charged.

Lisa Darnell
United States Immigration Judge
Baltimore, Maryland

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